

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEROY THOMAS

Claimant

VS.

INLAND CONTAINER CORPORATION

Respondent

AND

**INSURANCE COMPANY OF
STATE OF PENNSYLVANIA**

Insurance Carrier

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Docket No. 230,599

ORDER

Claimant appeals from the preliminary hearing Order of Administrative Law Judge Julie A. N. Sample dated April 2, 1998, wherein the Administrative Law Judge denied claimant benefits, finding claimant had failed to provide notice of an accident pursuant to K.S.A. 44-520 and failed to prove accidental injury arising out of and in the course of his employment on the date or dates alleged.

ISSUES

Claimant raises the following issues for Appeals Board consideration:

- “1. Whether the administrative law judge exceeded her authority and jurisdiction in denying medical treatment in the form of continued examinations, treatment and surgery by a physician.
2. Whether the administrative law judge exceeded her authority and jurisdiction in denying claimant temporary total disability benefits while off work pursuant to his physician’s order.
3. Whether the administrative law judge exceeded her authority and jurisdiction in finding that timely notice of the claim was not made by claimant to the respondent under K.S.A. 44-520.

4. Whether the administrative law judge exceeded her authority and jurisdiction in finding that claimant failed to establish a date of accident.
5. Whether the administrative law judge exceeded her authority and jurisdiction in finding that claimant's injury was not a repetitive trauma.
6. Whether the administrative law judge exceeded her authority and jurisdiction in finding that claimant has not sustained his burden of proof."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the evidentiary record, and for the purpose of preliminary hearing, the Appeals Board makes the following findings of fact and conclusions of law:

K.S.A. 1997 Supp. 44-534a limits the right of the parties to appeal from preliminary hearing orders. Specifically, jurisdictional issues with regard to whether claimant suffered accidental injury, whether the injury arose out of and in the course of employment, whether notice was given or claim timely made, and whether certain defenses apply are considered jurisdictional for the purpose of appeal. Claimant's issues 1 and 2 do not constitute jurisdictional issues under K.S.A. 1997 Supp. 44-534a even though worded in the terms of whether the Administrative Law Judge exceeded her jurisdiction. It is within an administrative law judge's authority to grant or deny medical treatment and temporary total disability compensation and claimant's issues 1 and 2 are dismissed. Claimant's issue 6 does not constitute an issue.

With regard to the appropriate date of accident, claimant alleges a single traumatic injury on August 1, 1997, followed by a series of injuries through December 19, 1997. Claimant suffered injury to his left knee when his foot became tangled in binding straps, causing him to trip. Claimant stated that, while this was a traumatic start to the injury, his knee worsened during the weeks following the injury due to the nature of his work. Claimant testified that, as his symptoms became worse, he developed a noticeable limp.

Respondent contends notice was not provided until October 13, 1997, which for an accident date of August 1, 1997, would exceed the 10-day requirements of K.S.A. 44-520. However, claimant alleges the worsening of his condition constitutes a series of accidental injuries and, therefore, an October 13, 1997, notification would be timely.

Claimant testified he notified his supervisor, Mr. Wade Kraft, of the accidental injury within minutes of the accident. Mr. Kraft denies being advised of the injury until October 13, 1997, 72 days after the alleged accident. Mr. Kraft went on to testify that he at no time ever saw claimant holding his knee and had no conversations with claimant prior to October 13, 1997, regarding the knee injury.

Claimant also testified that he told several coworkers including Ihor (a.k.a. Tony) Antoniak, Jeff Kinney and Charlie Miller about the accident on the day that it happened or the next day. All three of claimant's named witnesses testified contrary to claimant. None remembered having any conversations with claimant about any injury on August 1, 1997, and Mr. Antoniak advised that he first found out about the alleged injury in December, 1997. With regard to claimant's limp, Charlie Miller advised that he had seen claimant limping before July 1997 but that the injury occurred as a result of a fight in a bar. All three witnesses acknowledged claimant had a noticeable limp long before August 1, 1997. Mr. Kraft testified that claimant's limp did not become more pronounced as a result of any incident occurring in August 1997 or at any time thereafter. The first time claimant's limp was noticeably worse, in Mr. Kraft's opinion, was after claimant returned to work in March, 1998, after undergoing surgery.

Claimant took the deposition of Michael S. Shoemake, Sr., the respondent's plant superintendent. Mr. Shoemake testified that he was aware claimant had a bad knee as he had seen claimant limping in the plant area. When asked when he first discovered that claimant had a bad knee, Mr. Shoemake testified that claimant had walked with a limp for as long as he had known him and he had been at the plant since April 1, 1997. The first knowledge he had of claimant alleging an accidental injury on the job was October 13, 1997.

Claimant also took the deposition of Mr. Ron Moss, respondent's employee in charge of attendance records, payroll, insurance coverage, and personnel files. Mr. Moss was first advised of claimant's alleged accidental injury on October 13, 1997, when claimant said he would be absent from work due to surgery.

Claimant alleges the accidental injury occurred on August 1, 1997, with continuation through December 19, 1997. However, when asked specifically at the hearing to establish the date of accident, claimant testified that it was "some time between July and August."

In workers compensation litigation, it is claimant's burden to prove accidental injury arising out of and in the course of his employment. In addition, claimant must prove under K.S.A. 44-520 that he provided notice to the respondent of the accident within 10 days of the date of accident. Failure to provide notice within 10 days will be excused if just cause is established verifying claimant's reason for not providing timely notice. In this instance, the evidence supporting claimant's position consists of claimant's testimony only. That testimony is contradicted by his employer and his coworkers and by the fact claimant had a limp preexisting his alleged date of accident. No witnesses have verified that claimant tripped and fell on August 1, 1997, that claimant suffered any type of trauma related to his work, or that timely notice was provided to respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A. N. Sample dated April 2, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

c: Timothy M. Alvarez, Kansas City, MO
Laura E. Thompson, Overland Park, KS
Julie A.N. Sample, Administrative Law Judge
Philip S. Harness, Director